92-1980

Supreme Court, U.S.
FILED
JUN 14 1993
OFFICE OF THE CLERK

CASE NO._____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term - 1993

STATE OF OHIO

APPELLANT

vs.

MOSES P. RODRIGUEZ

APPELLEE.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

Jeffrey M. Welbaum
Prosecuting Attorney
201 W. Main Street
Troy, Ohio 45373
(513) 332-7005

BEST AVAILABLE COPY

QUESTION

Is a search, undertaken with consent, objectively unreasonable, outside of the scope of consent and therefore a violation of the suspect's Fourth Amendment Rights to be free from unreasonable searches when, (1) the officer has reason to believe that guns or narcotics are being carried in the suspect's automobile, (2) the officers informed the suspect of his belief and asks permission to search the automobile to look for "drugs, guns, or money" (3) the suspect permits the officers to search the automobile and does not place any explicit limitation on the scope of the search, and (4) the officer observes an anomalous wire leading into a panel in the back seat, observed a

crack in the molding, and pries back the crack and feels several packages inside the panel, which, upon removal of the panel, prove to be narcotics.

TABLE OF CONTENTS

	Page No.
Opinions Delivered in This Case	1
Jurisdiction	2
Constitutional Provisions	3
Statement of the Case	3
Argument	11
Conclusion	32
Appendix	34

TABLE OF AUTHORITIES

CASES

Florida v. Jimeno
___U.S., ___, 114 L.Ed.2d
(1991) 8,9,12,20

Florida v. Wells
539 So.2d 464 (1989) 12,13,20

Illinois v. Rodriguez
497 U.S. 177, 111 L.Ed.2d
148 (1990) 12,20

Katz v. U.S.
389 U.S. 347, 360, 19 L.Ed.2d
576 (1967) 11,12,28

People v. Crenshaw
12 Cal.Rptr.2d 172 (1992) .. 30

People v. Sesmas
227 Ill.App. 1040, 591 N.E.2d
918 leave to appeal denied,
146 Ill.2d 646, 602N.E..Rptr.2d
470 (1992) 28

State v. Wells
(1989), 539 So.2d 464 9

United States v. Espinosa
782 F.2d 888 (10th Cir.
1981) 23

United States v. Martinez
949 F.2d 117 (11th Cir.
1992) 26

United States v. Torres
663 F.2d 1019 (10th Cir.
1991) 23

U.S. v. Gutierrez-Mederos
965 F.2d 800 (9th Cir.
1991) 25

U.S. v. Pasciuti
793 F.Supp. 373
(D.N.H. 1992) 26

U.S. v. Pena
920 F.2d 1509
(10th Cir., 1990) 24

U.S. v. Reeves
798 F.Supp. 1459 (E.D. Washington, (D.C. 1991) 21

U.S. v. Springs
936 F.2d 1330 (D.C.C.A. 1991) 19

U.S. v. $75,040.00 In United States Currency
785 F.Supp. 1420 (D. Oregon 1991) 21

OPINIONS DELIVERED IN THIS CASE

The entry of the Supreme Court of the State of Ohio, Case No. 92-2578, which appears in the appendix hereto, page 1a, is unreported as of this writing.

The opinion and Journal Entry of the Court of Appeals for Miami County, Ohio, Case No. 92-CA-4, which appears in the Appendix hereto, Page 3a, is also unreported as of this writing.

The Decision and Judgment Entry of the Common Pleas Court of Miami County, Ohio, Case No. 91-CR-71, which appears in the appendix hereto, page 21a, is also unreported as of this writing.

JURISDICTION

The judgment of the Ohio Supreme Court, dismissing Appellant's appeal for the judgment of the Miami County Court of Appeals was entered on March 17, 1993. A Notice for Petition of Certiorari was timely filed in the Supreme Court of Ohio on June 11, 1993. This appeal is being docketed in this court within 90 days after the entry of the Judgment appealed from.

Jurisdiction in this court is predicated on 28 USC §1257-A, in which a Writ of Certiorari may be granted to review a state court decision by the highest court of the state in which the decision could be had, where "any title,

right, or privilege, or immunity especially set up or claimed under the Constitution...or any commission held or authority exercised under the United States."

CONSTITUTIONAL PROVISIONS

Fourth Amendment: Constitution of the United States

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On February 27, 1991, at 2:55 a.m., Appellee was stopped by a Miami County, Ohio, Deputy Sheriff for failing to signal a lane change and driving

erratically. Appellee did not have a valid driver's license. Appellee was placed in the deputy's car and was asked if he had any drugs, guns, or large sums of money in the car. Appellee stated that he did not. Appellee then was asked if the deputies could look in his car to ascertain that fact for themselves. Appellee said that he did not mind. During the course of the search, a loaded 9 mm. handgun was found in a duffel bag in Appellee's vehicle. Appellee was placed under arrest for carrying a concealed weapon and the car was transported back to the jail where the search could be continued out of the elements.

At the jail, a canine unit was used to assist in the search and the canine gave a recognizable indication that drugs were present in the Appellee's vehicle. When the deputy searched the area indicated by the canine, they observed an anomalous red wire going into the molding near the back seat. A crack in the molding was observed and one of the deputies placed his hand in the crack and felt packages inside. The officers then took screw drivers, removed the interior panel, and discovered ten (10) bags of cocaine weighing 10,097.3 grams.

On May 9, 1991, Appellee filed a Motion to Suppress in the Miami County, Ohio Common Pleas Court, General Division. On August 9, 1991, Appellee

filed a supplemental memorandum in support of its motion to suppress the cocaine seized. In that memorandum, Appellee argued his Fourth Amendment rights were violated, stating:

> "Nothing in evidence nor in the circumstances surrounding the search of the automobile upon reaching the sallyport would give rise to the reasonable belief that the Defendant herein consented to the search in dismantling of the car in which he was driving."

The Trial Court overruled the Appellee's Motion to Suppress on August 29, 1991. The Trial Court ruled that Appellee's Fourth Amendment rights were not violated, observing that:

> "...the Defendant did not limit the scope of his consent to search the motor vehicle. The deputy

> asked the Defendant if he could go through the car into which the Defendant consented. The trunk of the vehicle is part of the vehicle. At no time did the evidence disclose the Defendant ever limited or retracted his arrest consent to allow the deputies to search the vehicle. This consent included closed containers found in the vehicle, whether in the passenger compartment or the trunk."

The Appellee appealed the Trial Court's decision, filing a brief in support of his appeal on March 13, 1992. Within that original brief, Appellee renewed his Fourth Amendment claim arguing that "the search clearly exceeded the scope of the Defendant's consent." Additionally, on August 17, 1992, Appellee filed a reply brief in the Miami County Court of Appeals in

which he argued, "The case at bar is factually distinguishable from Jimeno, each of the factors noted in that case are absent the case at hand. In the case at hand, there was no expressed object by which the scope of the search could have been enlarged. The State does not contend that the officers had probable cause or any basis for reasonable suspicion that any drugs, guns, or large sums of money were contained in the suspects automobile. Nor, did the officer inform the suspect that any suspicion of any drugs, guns, or large sums of money were present in the vehicle." In the Court of Appeals for Miami County, Ohio, on November 20, 1992, the Court ruled in favor of

Appellee and suppressed the cocaine seized in his vehicle. The Court, relying upon Florida v. Jimeno, ___U.S. 114 L.Ed.2d 297 (1991), argued that "It was not objectively reasonable for Lt. Steinke to construe Rodriguez' response that he did not mind if I looked in his car as a consent to Lt. Steinke's removing an interior panel to locate contraband." The Appellate Court, agreeing that Appellee's Fourth Amendment rights had been violated, relied upon the Supreme Court of Florida case State v. Wells, (1989), 539 So.2d 464 (cited favorably in Jimeno), for the proposition that:.

> "it was very likely unreasonable to think that Rodriguez, by saying he did not mind if I, (Lt. Steinke) looked in his car, agreed to Lt. Steinke's and Deputy Stevenson's using screw

drivers to remove the interior panel..."

On December 22, 1992, the State of Ohio filed a Memorandum in Support of Jurisdiction in the Supreme Court of Ohio, Case No. 92-2578. In that memorandum, the State of Ohio specifically argued that Jimeno and cases following it did not support the contention of the Appellate Court that removal of an interior panel of an automobile is objectively unreasonable and therefore outside of the scope of consent. The Supreme Court of Ohio, on March, 17, 1993, filed an Entry Denying the State of Ohio's Motion for Leave to Appeal and ordered that the Appeal be dismissed sua sponte for the reason that no substantial constitutional question

existed therein.

ARGUMENT

The primary issue involved in this case is the manner in which the scope of a consent search is to be delineated. This question involves a suspect's Fourth Amendment rights to be free from unreasonable searches. Granting an officer a consent to search property which is protected by the Fourth Amendment is one exception to the general requirement that a warrant is necessary to conduct a search. Historically, reasonableness has been a key component with respect to any Fourth Amendment question, Katz v. U.S., 389 U.S. 347, 360, 19 L.Ed.2d 576 (1967). Specifically, reasonableness has been

utilized as the means of delimiting the scope of a suspect's consent to search. The scope of a consent to search has been defined as that which is "objectively reasonable." Illinois v. Rodriguez, 497 U.S. 177, 111 L.Ed.2d 148 (1990). The standard was further articulated in Florida v. Jimeno, ___ U.S. ___, 114 L.Ed.2d 297 (1991). In Jimeno, this Court articulated the standard for determining the scope of a consentual search as "What would the typical reasonable person have understood by the exchange between the officer and the suspect?" Jimeno, 302.

The Jimeno case is significant beyond its articulation of a standard for determining the scope of a consentual

search in that this court attempted to apply the concept of objective reasonableness to specific fact patterns. In Jimeno, the police received consent to search the car of the suspect and proceeded to open and search a paper bag found on the floorboard of the automobile. Inside the bag, police officers found a kilogram of Cocaine. The Defendant in Jimeno argued that searching the paper bag was outside the scope of the consent which he gave. He cited the case of Florida v. Wells, 539 So.2d 464 (1989), in support of his argument that closed containers could not be opened during the course of a consentual search. This court rejected the Defendant's argument

observing that "We think that it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within the car which might bear drugs. A reasonable person may be expected to know if narcotics are generally carried in some form of container." Jimeno, 303. This court went on to argue in Jimeno that the fact situation in State v. Wells, was not within the bounds of objective reasonableness. In Wells, the police, during the course of a consent search, pried open a locked briefcase they found in the trunk of the defendant's automobile. This court observed "It is very likely unreasonable to think that a

suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk...", 303. Thus, within the confines of the Jimeno decision, two distinct factual patterns are discussed, one of which was found to be within the scope of consent granted, the other of which was not. This court went on to express confidence in the lower court's abilities to manage under the objective reasonableness standards. Specifically, this court rejected the argument that when looking into closed containers, specific consent would be necessary to search every closed container within a general consent search. The court observed, "We see no basis for adding

this sort of superstructure to the Fourth Amendment basic test of objective reasonableness." 303.

Unfortunately, this court's confidence in lower courts' abilities to manage the objective reasonableness standard may not have been well founded. Specifically, in the case at hand, the Miami County, Ohio, Court of Appeals opinioned that the fact situation was similar to the very narrow fact situation observed by the Jimeno court in Florida v. Wells. Noting that the Jimeno court favorably cited Wells to stand for the proposition that it is objectively unreasonable to search a locked container, the Miami County Appellate Court cited Jimeno to argue

that removing an interior door panel of a car was similar to breaking open a locked briefcase. The Supreme Court of the State of Ohio did not recognize the conflict this decision created with other court decisions following the Jimeno ruling. By denying jurisdiction, the Ohio State Supreme Court accepted the Court of Appeal's position that removal of an interior door panel constituted an unreasonable search and seizure insofar as it was outside the scope of the general consent granted.

The Constitutional question in this case can be phrased as follows: "Does the Constitution prohibit, during the course of a general consent search, the removal of an interior panel of an

automobile as per se unreasonable."

The decision of the Ohio Appellate Court and the Ohio Supreme Court is at odds with several U.S. Appellate Court decisions as well as the decision of the highest court in the State of Illinois. The manner in which Jimeno and Wells is to be read poses the first significant conflict between the Ohio Appellate and Supreme Court decision and other court decisions subsequent to Jimeno. The Ohio Appellate and Supreme Court seemed to be arguing that the Wells decisions forms the basis for a substantial exception to those areas which can be searched during the course of a general consent to search. The Ohio Court of Appeals and Supreme Court opinions

attempt to analogize the removal of an interior panel of a car to breaking open a locked briefcase as in Wells. Other courts after Jimeno have viewed Wells in a much narrower sense. In fact, some courts have used Wells to stand only for the proposition that a locked briefcase can not be broken into. The best example of this line of reasoning is U.S. v. Springs, 936 F.2d 1330 (D.C.C.A., 1991). In that case, the court examined the issue of scope of consent with respect to the seizure and opening of a baby powder container found within the luggage of the defendant. The defendant argued that this action was beyond the scope of the general consent because it was more like the

fact situation in Wells than that of Jimeno. The Appellate Court rejected this contention and took substantial steps in clarifying the extent of the Jimeno decision. In Springs, the court noted:

> "We appreciate the distinction [between Jimeno and Wells], but note that in the present case the evidence supports a view that opening of the baby powder container did not depend upon possession of a key, knowledge of a combination, or anything other than merely removing its lid. Neither did the fact of its opening render it useless, any more than the opening of the folds destroyed the usefulness of a paper bag in Jimeno. Therefore, we await with the Supreme Court the day when the locked briefcase comes before us."
> 1334-35.

Thus, in Springs, the U.S. Appellate

Court for the District of Columbia was reluctant to expand upon those areas which are deemed to be unreasonable and outside of the general scope of consent beyond the fact situation of Wells. This reluctance is further supported by several U.S. District Court cases. In U.S. v. Reeves, 798 F.Supp. 1459 (E.D. Washington, 1992), the Court observed that: "Under a narrow reading of Jimeno, a general consent to search a vehicle for narcotics authorizes the search of any container that might contain narcotics except locked briefcases located in the trunk area." 1468-69. Similarly, in U.S. v. $75,040.00 in United States Currency, 785 F.Supp. 1420 (D. Oregon 1991), the

Court characterized the Jimeno decision as standing for the proposition that, "Consent to search a car would not reasonably extend to breaking open a locked container." 1428.

The second, and more significant, area of conflict pits the Ohio Appellate and Supreme Courts against U.S. Courts of Appeals and State court decisions on the issue of the extent to which searching the substructure of a vehicle, is within the scope of a general consent to search. By substructure searches, the State of Ohio is referring to those searches involving the removal of parts of the structure of an automobile. Prior to Jimeno, it has historically been held that such substructure

searches were within the general scope of consent. In the Tenth Circuit Court of Appeals alone, three significant decisions upheld substructure searches as being within the general scope of consent. In United States v. Torres, 663 F.2d 1019 (10th Cir., 1981), the Tenth Circuit Court of Appeals upheld the validity of a search in which the police officers removed the air vent cover in the side of the door of the suspect's automobile in order to find money hidden therein. The court concluded that such a search was within the general scope of consent. In United States v. Espinosa, 782 F.2d 888 (10th Cir., 1986), the Tenth Circuit Court of Appeals upheld a search as within the

scope of a general consent to search when a police officer observed several screws missing from a rear interior door panel and lifted up the loose corner of the panel to discover Cocaine. Finally, in U.S. v. Pena, 920 F.2d 1509 (10th Cir., 1990), the Tenth Circuit Court of Appeals upheld as within the scope of a general consent to search, a search in which a police officer took a screw driver and removed the rear quarter panel of the suspect's vehicle and moved a piece of cardboard underneath the panel to discover concealed within it four containers of cocaine.

After Jimeno, several U.S. Courts of Appeals have still accepted the validity of substructure searches as within the

scope of a general consent to search. The least intrusive example of this acceptance of substructure searches is the case of U.S. v. Gutierrez-Mederos, 965 F.2d 800 (9th Cir., 1992). There, the Ninth Circuit Court of Appeals concluded that it was within the general scope of consent and objectively reasonable for police officers to pull away a loose cardboard divider inside the compartment of a hatchback in order to discover illegal narcotics. As the court observed, "The scope of the search generally is defined by its expressed object. Here, Anderson explained that he wanted to check for weapons and narcotics. Appellant responded, 'Go ahead', and placed no explicit limit on

the scope of that search. This general statement authorized the trooper to search any container within the car that reasonably could contain contraband." 803-804.

Another less intrusive substructure search is found in U.S. v. Pasciuti, 793 F.Supp. 373 (D.N.H. 1992), a New Hampshire United States District Court decision. In Pasciuti, the court observed that it was permissible as within the general scope of consent to search behind a pickup truck's flat bed liner and discover drugs and guns.

Even more intrusive, however, is the substructure search conducted in United States v. Martinez, 949 F.2d 1117 (11th Cir., 1992). There, the Eleventh

Circuit Court of Appeals evaluated a general consent search in which the area to be searched was a mini warehouse unit. Within the unit was a car owned by the Defendant. The police officers searched the passenger compartments of the automobile, tilted the rear seat forward and removed the board separating the passenger compartment from the trunk, and pried open the trunk itself in order to gain access. The defendant argued that such a search was clearly outside the scope of her consent. The Court of Appeals, however, observed that:

> "We hold that a general consent to search a specific area for specific things includes consent to open locked containers that may contain the objects of the

search, in the same manner that such locked containers would be subject to search pursuant to a valid warrant. trunk was within the scope of Martinez consent because it was within the area authorized to be searched, and it was reasonably capable of containing the object of the search." 1120

The court went on to observe that "reasonable, non destructive removal of impediments was necessary to search for contraband and to gain access to other areas or compartments within the scope of the search." 1121 Thus, the Martinez Court accepts any substructure search when it's reasonable to believe that drugs may be found witnin parts of the substructure.

This position is supported by the decision of People v. Sesmas, 227

Ill.App. 1040, 591 N.E.2d 918, leave to appeal denied, 146 Ill.2d 646, 602 N.E.Rptr.2d 470 (1992). In Sesmas, during the course of a general consent search, police officers observed that the bolts holding a gas tank in place under the car appeared to have been recently removed. Based on this information, the car was towed to a local service station, was placed on a hoist, and the police removed the gas tank and discovered a false compartment containing Cocaine therein. The court in Sesmas observed that, a consent form was used which specifically granted the officers authority to "search any part, compartment, enclosure, or trunk of the vehicle and the contents of any object

or container found therein." 923 The court reasoned that such a consent form validated any substructure search that occurred thereafter.

Finally, it should be noted that state courts have also accepted substructure searches as being within the scope of a general consent to search. For example, in People v. Crenshaw, 12 Cal.Rptr.2d 172 (1992), the police officer used a screwdriver to remove a tool marked screw from a door vent and discovered guns and narcotics. The California Fifth District Court of Appeals undertook a rather elaborate analysis of the concept of substructure searches, and in conclusion argued that:

> "Crenshaw knew the object of the officer's search, to wit:

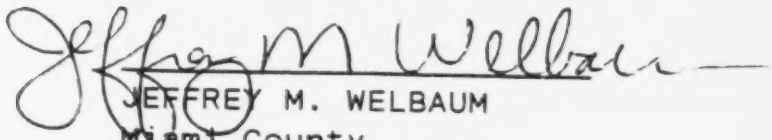
> drugs. No reasonable person would expect narcotics to be scattered loosely throughout the vehicle. Narcotics are generally carried in some form of container. . . . Here, to an experienced officer, the suspicious door panel was not in an unlikely repository of narcotics. It reasonably could be expected to contain the object of the search. As noted . . . a consent search, to be effective, must be thorough. Crenshaw's consent to search the car for drugs, under these facts, include a consent to remove the door vent and search the door panel which might reasonably hold drugs." 179.

CONCLUSION

The sum total of these federal and state cases is a profound predilection to permit substructure searches as being objectively reasonable and within the scope of a general consensus search.

The ruling in this case by the Ohio Appellate and Supreme Courts reflects significant deviation in the general body of law and involves an overbroad reading of State v. Wells. This deviation causes a substantial conflict of opinion with respect to the proper interpretation of the Fourth Amendment of the United States Constitution. Such a conflict should be resolved in order to prevent further confusion. This court should, therefore, grant Appellant's Petition For Certiorari and accept this case for further review.

Respectfully submitted,



JEFFREY M. WELBAUM
Miami County
Prosecuting Attorney
201 W. Main Street
Troy, Ohio 45373
Attorney for Appellant

June 11, 1993

APPENDIX

Page

March 17, 1993 Entry of
The Supreme Court 1a

November 20, 1992 Opinion
in the Court of Appeals of
Miami County, Ohio 3a

August 29, 1991 Decision--
Judgment Entry of Common
Pleas Court of Miami
County 21a

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ of Certiorari was sent by regular U.S. Mail to Mr. Jose M. Lopez, Attorney for Appellee, at 312 W. Main Street, Troy, Ohio, 45373, this 10th day of June, 1993.

Jeffrey M. Welbaum

APPENDIX

The Supreme Court of Ohio

1993 TERM

To wit: March 17, 1993

State of Ohio, : Case No. 92-2578

Appellant, : ENTRY

v. :

Moses P. Rodriguez, :

Appellee. :

Upon consideration of the motion for leave to appeal from the Court of Appeals for Miami County, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

- Motion Fee, $40.00, paid by Jeffrey M. Welbaum.

(Court of Appeals No. 92CA4)

THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS
FOR MIAMI COUNTY, OHIO

THE STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 92-CA-4

vs. : T.C. CASE NO. 91-CR-71

MOSES P. RODRIGUEZ :

Defendant-Appellant :

. . . . . .

O P I N I O N

Rendered on the 20th day of November, 1992.

JEFFREY M. WELBAUM By JANE O. SKOGSTROM, Assistant Prosecuting Attorney, 201 West Main Street, Troy, Ohio 45373
Attorney for Plaintiff-Appellee

JOSE M. LOPEZ, 80 South Plum Street, Troy, OH 45373
Attorney for Defendant-Appellant

. . . . . .

WOLFF, J.

Moses P. Rodriguez entered a plea of no contest to an amended charge of aggravated trafficking, a violation of R.C. 2925.03(A)(6) which is an

aggravated felony of the second degree, and to a firearm specification to that charge. The trial court found him guilty and imposed consecutive sentences of four to fifteen years on the principal charge, three years of which was actual incarceration, and three years actual incarceration on the firearm specification. The court also imposed a fine of $5,000 and costs.

Rodriguez's first assignment of error is that the trial court erred in overruling his motion to suppress.

The evidence at the suppression hearing established that on February 27, 1991, at approximately 2:55 a.m., Rodriguez was stopped by Miami County Sheriff's Deputy Doug Kirk as he drove south on Interstate 75 in Miami County, Ohio. Deputy Kirk had observed two

driving infractions which prompted him to stop Rodriguez's car. Rodriguez was asked for his operator's license and informed Deputy Kirk that his license had expired. Because Rodriguez appeared "nervous" to Deputy Kirk, he called for assistance. Lt. Eugene Steinke arrived in response to the call for assistance, and he and Deputy Kirk then placed Rodriguez in the back of Deputy Kirk's cruiser. Rodriguez gave Lt. Steinke permission to obtain the automobile registration from the glove box. Thereafter, Lt. Steinke asked Rodriguez if he was transporting any guns, money, or drugs, to which Rodriguez responded that he was not. Although the testimony contains some variations of the next exchange between Lt. Steinke and Rodriguez, Lt. Steinke testified on

cross-examination that "I asked if I could look at his car", and that Rodriguez responded that he "did not mind if I looked in his car." Lt. Steinke then proceed to examine the interior of Rodriguez's car and found no contraband. On the basis of certain observations he made of the interior of the car and certain information he received from Deputy Kirk, Lt. Steinke did suspect that Rodriguez was involved in drug courier activity. Lt. Steinke unlocked the trunk of the car and unzipped a duffle bag that he found in the trunk. In the duffle bag, he found a loaded semi-automatic handgun. After discovering the weapon, Lt. Steinke instructed Deputy Kirk to handcuff Rodriguez and to arrest him for the offense of improper transportation of a

firearm in a motor vehicle. Rodriguez was then transported to the jail at the Miami County Sheriff's Department, and the car was towed to the sally port at the Miami County Sheriff's Department. According to Lt. Steinke, one of the purposes of towing the car was to continue the search of the car in more convenient surroundings than those afforded by Interstate 75 in the early morning hours. Once the car was at the sally port at the sheriff's department $1,580 in $20 bills was found in the duffle bag. Deputy Mark Stevenson was then summoned to the sally port, together with a dog that was trained to detect narcotics. The dog was eventually put inside the car where it reacted positively in the vicinity of an interior panel in the rear of the car

on the driver's side. According to Lt. Steinke, they removed "some of the trim off the bottom (of the panel) and looked inside and we could see a package." Lt. Steinke and Deputy Stevenson then obtained screwdrivers and removed the panel, revealing several wrapped packages of what turned out to be cocaine. Lt. Steinke testified that he thought Rodriguez had consented to the removal of the panel. It was also determined that the panel was hinged, and wired to a button under the dashboard, which could be pressed to open the panel.

The trial court appears to have determined that the entire search of the vehicle, including the search of the trunk and the removal of the interior panel, had been consented to by

Rodriguez. Furthermore, citing New York v. Belton (1981), 453 U.S. 454, the trial court agreed with the State that the search at the Sheriff's Department was justifiable as "incident to a lawful arrest (for the loaded firearm in the trunk)."

It is clear from the evidence that the discovery of the cocaine did not occur in the course of a routine or standard inventory search. The evidence does not suggest, nor does the State argue, that any exigent circumstances existed that would have excused the police from obtaining a search warrant. Finally, the State has, at oral argument, acknowledged the difficulty of justifying the search of the car at the sally port as being incident to a lawful arrest.

The State's candor is appreciated, and well advised. In Belton, supra, the court considered a situation wherein a policeman stopped a car containing four occupants for speeding. He smelled marijuana, ordered the occupants out of the car, and arrested them for unlawful possession of marijuana. He searched the passenger compartment of the car, and found a jacket belonging to Belton. He unzipped a jacket pocket and found cocaine which Belton was later charged with unlawfully possessing, and which he eventually moved to suppress. Although New York's highest court determined that the cocaine had been seized unlawfully, the Supreme Court of the United States disagreed:

> Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant

of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.[3]

It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within this reach.[4]

---

3. Our holding today does no more than determine the meaning of Chimel's principles in this particular and problematic content. It in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests.

4. "Container" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.

(Id. at 460-461).

Footnote 3 is of particular significance. Chimel v. California (1969, 395 U.S. 752 made it abundantly clear that the "search incident to lawful arrest" exception to the warrant requirement of the Fourth Amendment was confined to searches for the protection of the arresting officer and for the prevention of the destruction of evidence.

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in

order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs - or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial processes" mandated by the Fourth Amendment requires no less.

This is the principle that underlay our decision in Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 2d 777. In that case three men had been arrested in a parked car, which had later been towed to a garage and

searched by police. We held the search to have been unlawful under the Fourth Amendment, despite the contention that it had been incidental to a valid arrest. Our reasoning was straightforward:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime - things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest." Id., at 367, 84 S.Ct., at 883.

Id. at 762-764.)

In State v. Brown (1992(, 63 Ohio St. 3d 349, a unanimous court reaffirmed, for purposes of Ohio jurisprudence, Chimel's strict limitations of the "search incident to lawful arrest" exception to the warrant requirement, and disavowed any reading of Belton

which would relax those limitations. See particularly pp. 352-353.

By the time Rodriguez's car arrived at the Sheriff's Department, Rodriguez was in custody and incapable of either obtaining a weapon from the car or destroying evidence within the car. The warrantless search at the Sheriff's Department could therefore not be justified as incident to a lawful arrest.

We thus turn to whether Rodriguez consented to the removal of the interior panel that revealed the presence of the several packages of cocaine. In Florida v. Jimeno (1991), 111 S.Ct. 1801, the Supreme Court had occasion to discuss the standard for measuring the scope of a suspect's consent to the search of his car:

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

> The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect?

The issue in Jimeno was whether the suspect's general consent to a search of his car included a consent to examine a paper bag lying on the floor of his car. The Supreme Court framed the issue as being whether it was reasonable for the officer to consider the suspect's general consent to a search of his car as including consent to examine a paper bag lying on the floor of the car. P. 1804. The court determined that examination of the paper bag on the floor of the car was within the scope of the suspect's general consent to a search of his car.

In this case, Lt. Steinke testified

that he thought that the permission he had received from Rodriguez to "look... in his car" extended to the removal of the interior panel. The trial court appears to have agreed with Lt. Steinke, noting that Rodriguez "did not limit the scope of his consent to search the motor vehicle."

In our judgment, it was not objectively reasonable for Lt. Steinke to construe Rodriguez's response that he "did not mind if I looked in his car" as a consent to Lt. Steinke's removing the interior panel to locate contraband.

In Jimeno, the Supreme Court of the United States reversed the Supreme Court of Florida which had affirmed the suppression order entered by the trial court. The Supreme Court of Florida had affirmed on the basis of State v. Wells

(1989), 539 So.2nd 464. In reversing, the Supreme Court of the United States distinguished the facts in Jimeno from those in Wells:

> The facts of this case are therefore different from those in State v. Wells, supra, on which the Supreme Court of Florida relied in affirming the suppression order in this case. There the Supreme Court of Florida held that consent to search the trunk of a car did not include authorization to pry open a locked briefcase found inside the trunk. It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag. Jimeno, p. 1804.

The Supreme Court of the United States did not criticize the opinion of the Supreme Court of Florida in Wells. Indeed, it observed that is was "very likely unreasonable" for an officer to think that a suspect's consent to a search of his trunk was a consent to

breaking open a locked briefcase found inside the trunk. Here, the discovery of the cocaine required some dismantling of the car, in that Lt. Steinke and Deputy Stevenson used screwdrivers to remove the interior panel. Given these facts, we are constrained to conclude that it is "very like unreasonable" to think that Rodriguez, by saying he "did not mind if I (Lt. Steinke) looked in his car", agreed to Lt. Steinke's and Deputy Stevenson's using screwdrivers to remove the interior panel - indeed, to their dismantling his car - to search for contraband, particularly after Rodriguez, when asked by Lt. Steinke, had denied that there were guns, money, or drugs in the car.

Accordingly, we conclude as a matter of law that the evidence does not

support the trial court's determination that Rodriguez consented to the removal of the interior panel. Given the absence of a search warrant, or any recognized exception to the search warrant requirement, the removal of the interior panel was impermissible under the Fourth Amendment. We must therefore sustain Rodriguez's first assignment of error.

In that Rodriguez was not charged with a separate offense involving the weapon, it is unnecessary for us to consider the propriety of the search of the trunk and of the duffle bag found in the trunk.

In his second assignment of error, Rodriguez asserts that the trial court erred in determining that R.C. 2945.141 applies in a situation where the firearm is in a locked trunk and inaccessible

to the defendant.

A conviction of a firearm specification can only exist in conjunction with a conviction of a felony. See R.C. 2929.71(A)(1). In view of our disposition of the first assignment of error, the second assignment of error is rendered moot and is accordingly overruled. See App R. 12(A)(1)(c).

Pursuant to our disposition of Rodriguez's first assignment of error, the judgment of conviction is reversed, and Rodriguez is discharged.

. . . . . .

WILSON, J. and GRADY, J., concur.

Copies mailed to:

Jane O. Skogstrom
Jose M. Lopez
Hon. Robert J. Lindeman

IN THE COMMON PLEAS COURT
OF MIAMI COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO,	:	CASE NO. 91CR71
PLAINTIFF,	:	JUDGE ROBERT J. LINDEMAN
VS.	:	
MOSES RODRIGUEZ	:	DECISION-JUDGMENT ENTRY
DEFENDANT.	:	

: : : : : : : : : : : : : :

This matter came on for hearing June 28, 1991 upon the Defendant's motion to suppress money, revolver and narcotics seized from a motor vehicle which the Defendant was operating on February 27, 1991, in Miami County, Ohio.

Pursuant to Crim. R. 12 (E) the following essential findings of fact are made:

(1) Deputy Kirk observed a 1978 Lincoln Continental with out of state

license plates violating the turn signal and marked lane laws on Interstate 75 in Miami County, Ohio.

(2) Deputy Kirk had probable cause to initially stop the vehicle for the traffic law violations.

(3) Upon approaching the vehicle Deputy Kirk noticed the Defendant appeared nervous and the Defendant admitted to the Deputy his (Moses P. Rodriguez, the Defendant herein) driver's license had expired.

(4) Deputy Kirk had probable cause to continue to detain the Defendant and verify the statement concerning the driver's license law violation.

(5) The Defendant was removed to the rear of the Sheriff's cruiser where, during general conversation he was asked if he was carrying any guns, drugs or

money (in the car). The Defendant replied no. The Defendant was in custody at this point in time.

(6) The Defendant was then asked by Deputy Steinke, the second deputy on the scene if he (Steinke) could "go through the car." The Defendant replied OK. The evidence did not demonstrate any coercion or implied force or duress or threat of force by the deputies.

(7) Deputy Steinke then began searching the vehicle which was still parked along I-75 and noticed slits in the roof liming of the vehicle and that the screws in the floorboard of the car had been removed in the past. No contraband was found in the interior of the vehicle at this time.

(8) Deputy Steinke then used the vehicle keys to open the trunk and

inside was a travel (or duffel) bag which was zipped shut. The deputy unzipped the bag and found a loaded 9mm pistol. The deputies had probable cause to continue to detain and arrest the Defendant on criminal charges of improper transportation of a firearm in a motor vehicle.

(9) The Defendant was then transported from I-75 to the Sheriff's Department for processing and the vehicle was towed to a sallyport at the Sheriff's Department to, (as the deputy testified) continue the search already begun and not to leave the vehicle stranded along I-75.

(10) In the sallyport 50 twenty ($20.00) dollar bills were found banded together and another 29 twenty ($20.00) dollar bills were found banded together,

in the travel bag. ($461.00 was taken from the Defendant's person at the jail.)

(11) A dog trained to detect narcotics was brought to the sallyport by his handler, Deputy Stephenson. The dog exhibited indicators in the interior of the car which were consistent with the presence of narcotics (quarter panels in rear of driver's side).

(12) The deputies then found ten (10) kilo size packages of cocaine hidden behind molding in the wall of the vehicle. It was then noticed a red wire traveled from the rear panel to the front of the vehicle near the emergency brake where a white button was located. When the vehicle's ignition was on and the button pushed, the panels flipped down, exposing the compartment in which

the drugs were transported.

The burden of proof on the State of Ohio in this case is by clear and positive evidence, ie: greater than a preponderance but less than beyond a reasonable doubt. St. v. Danby (1983) 11 Ohio App. 3d 38.

In the present case, Deputy Kirk specifically noted traffic violations he observed which led to the initial stop of the vehicle. The officer had probable cause to stop the vehicle. St. v. Chatton (1984) 11 Ohio St. 3d 59.

The Defendant did not possess a valid driver's license (he admitted it expired) which justified his further detention at the scene of the stop for traffic violations.

Considering the totality of the circumstance it is determined the

Defendant consented to the search of the motor vehicle. St. v. Childress (1983) 4 Ohio St. 3d 217.

The fact that officers did not read the Defendant his "Miranda" warnings prior to seeking his consent to search is not determinative of the issue. It is merely one factor consider when looking at the totality of the circumstances. St. v. Austin (1976) 52 Ohio App. 2d 59, U.S. v. Garcia (C.A. 5th 1974) 496 F. 2d 670.

The Defendant did not limit the scope of his consent to search the motor vehicle. The deputy asked the Defendant if he could go through the car to which the Defendant consented. The trunk of a vehicle is part of the vehicle. At no time did the evidence disclose the Defendant ever limited or retracted his

express consent to allow the deputies to search the vehicle. This consent included closed containers found in the vehicle whether in the passenger compartment or the trunk. U.S. v. Ross (1982) 456 U.S. 798. California v. Acevedo (1991) 500 U.S. _____, 114 L. Ed. 2d 619, 111 S. Ct. _____.

The deputies, having permission to be in the vehicle, properly subjected the vehicle to the investigative procedure of a sniff test by a trained narcotics detection dog. U.S. v. Place (1983) 462 U.S. 696.

In the present case, Lefty the dog performed as he was trained to do; he detected narcotics, and direct the officers' attention to a specific area of the vehicle where a hidden panel was found and the narcotics discovered.

The State has also noted the search at the sally port was incident to a lawful arrest (for the loaded firearm in the trunk). New York v. Belton (1981) 453 U.S. 454. Having determined the search of the trunk and duffel bag along I-75 were lawful, the State's position that the subsequent search of the vehicle at the Sheriff's Department after the Defendant's arrest for the loaded firearm is also well-taken.

Defendant's motion to suppress the gun, money, and narcotics seized from the 1978 Lincoln Continental he was operating in the early morning hours of February 27, 1991 on Interstate 75 in Miami County, Ohio, is overruled.

ROBERT J. LINDEMAN, JUDGE

cc: Prosecutor
Jose M. Lopez